UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

In re Holocaust Victim Assets Litigation	Master Docket No. CV96-4849 (ERK)(MDG)
This Document Relates to All Actions	Consolidated with CV-96-5161 and CV-97-461

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BROOKLYN OFFICE

SECOND SUPPLEMENTAL DECLARATION IN
SUPPORT OF APPLICATION FOR ATTORNEYS' FEES

BURT NEUBORNE, an attorney duly admitted to practice before this Court, hereby affirms under penalty of perjury:

1. I have served as Court-designated Lead Settlement Counsel herein since April 1, 1999. I make this declaration in support of a request for an immediate hearing in connection with my pending application for attorneys' fees for my seven years of service as Lead Settlement Counsel.

2 On December 19, 2005, acting pursuant to Rule 23(h), and Rule 54(d), I filed an application for lodestar attorneys' fees consisting of a formal motion; a sworn petition containing an elaborate description of the services for which compensation is sought, supported by detailed contemporaneous time records; and a memorandum of law. Copies were served on settlement counsel and the Special Master for Allocation and Distribution. Shortly thereafter, copies were provided to Samuel Dubbin at his request.

3. Extensive reports of the pending fee application have been published in The Forward, Haaretz and Israeli News Service. Finally, notice of the fee application,

together with copies of all supporting documents, has been posted on the Swiss bank litigation website maintained by the Special Master for Allocation and Distribution.

4. On December 29, 2005, Robert Swift, a settlement counsel, filed an objection to the application. Shortly thereafter, Samuel Dubbin, purporting to represent certain unnamed class members, lodged an objection to the application, and placed numerous documents into the record that provide no support for his objection.

5. On February 3, 2006, with the permission of the Court, Lead Settlement Counsel responded to the objections, filing a supplemental declaration that responded fully to Mr. Swift's concerns, and submitting multiple declarations by co-settlement counsel and experienced practitioners in support of the application.

6. On February 9, 2006, Messers Swift and Dubbin conducted a conference call with Samuel Issacharoff, Mr. Neuborne's counsel, at which both objectors agreed to submit all material opposing the application by February 17, 2006. Mr. Swift sent a letter to the Court memorializing the time schedule.

7. In response to the February 9, 2006 agreement among counsel, Lead Settlement Counsel supplied Mr. Swift with the number of hours (627) billed to the German slave labor cases in 2000, and supplied Mr. Dubbin with a copy of the January 5, 2001 transcript containing discussion of Lead Settlement Counsel's compensation for post-settlement legal work. Counsel has also provided Mr. Dubbin, at his request, with the two references to the Swiss Holocaust litigation occurring in counsel's November 8, 2000 German slave labor fee application.[1]

[1] Attached to this Declaration is the e-mail correspondence between my counsel, Mr. Issacharoff and Mr. Dubbin. The material provided to Mr. Dubbin from counsel's November 8, 2000 fee application, reads:

8. Mr. Swift submitted a letter to the Court dated February 11, 2006, reiterating his objection to the notice given in connection with the fee application. As of February 22, 2006, no further material had been received from Mr. Swift.

9. Mr. Dubbin submitted a supplemental objection on February 17, 2006, in which he re-hashes his contentions that additional notice is required; that Lead Settlement Counsel is estopped from seeking compensation for post-settlement work because he waived fees for pre-settlement work;[2] and that counsel's contemporaneous time records are inaccurate. Nothing in Mr. Dubbin's February 17 submission casts doubt on any of the records, except to highlight that counsel took his responsibilities very seriously and worked long hours in seeking to implement the settlement. In response to each quarrel with a particular time entry posed by Mr. Dubbin at pp19-25:

(a) Kingsboro Community College Forum – Mr. Dubbin incorrectly asserts that counsel failed to attend a community forum at Kingsboro Community College for which

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> I declined to seek fees for achieving a settlement in the Swiss Bank cases for personal reasons. I plan to seek modest hourly compensation for my post-settlement activities as court-appointed lead settlement counsel. *Petition*, n.3.
>
> The time charges reflected in this document are for activities in connection with the litigation and negotiations that culminated in the establishment of the Foundation. I have not included any time attributable to the Swiss bank litigation. When significant travel is involved, I have attempted to subtract pure travel time so as to bill only for time actually expended in the performance of legal tasks. Finally, I have made no effort to bill for the enormous expenditure of time in connection with efforts to respond to individual inquiries from Holocaust victims about the pending litigation, or their right to receive funds from the Foundation or the Swiss settlement fund. As a matter of general practice, I set aside several hours a week to speak to individual Holocaust victims. *German Time Records*, n 1

[2] The only new material relating to Mr. Dubbin's judicial estoppel argument contained in his February 17 submission is a citation to Lead Settlement Counsel's November 5, 1999 Declaration in Support of the Settlement's Fairness. Mr. Dubbin twists the language out of context. As has been explained to Mr. Dubbin on multiple occasions, Lead Settlement Counsel's reference to *pro bono* work was clearly intended to describe the fact that Lead Settlement Counsel had no economic stake in the settlement similar to the economic conflicts that had doomed the *Amchem* settlement. Taken in context, the November 5 declaration had nothing to do with compensation for the seven years of post-settlement effort as Lead Settlement Counsel.

counsel billed 2 hours. In fact, counsel attended the forum for more than 2 hours, but refused to participate further and left the building because members of the audience, including representatives of Norman Finkelstein, became personally abusive, and made derogatory remarks concerning counsel's deceased daughter;

(b) Bazyler piece – Mr. Dubbin complains that counsel billed 26 hours for writing a report of the administration of the settlement. In fact, counsel was asked to prepare a report on the administration of the Swiss settlement for widespread publication by Professor Bazyler. Since such an opportunity provided an excellent way to inform the class and the public of the progress of the settlement, the 26 hours were undoubtedly well-spent;

(c) Dec. 30, 1999 – Mr. Dubbin complains that it should not have taken 2 hours to respond to his letter. In fact, the time was taken preparing for the challenges to the settlement's fairness which were obviously being planned. Lead Settlement Counsel had just received instructions to renegotiate the settlement, and was seeking to place the Dubbin objections in the negotiations context – the time was necessary and well spent;

(d) December 22, 2000 – Mr. Dubbin complains that Lead Settlement Counsel spent 2 hours analyzing allocation issues raised by Mr. Dubbin's appeal prior to the filing of Schedules C and D. However, it was obvious what Mr. Dubbin's objections were. He had fully articulated them in the District Court. It would have been silly to wait for the C and D filing, which added nothing to counsel's knowledge;

(e) Feb. 28, 2001 – Mr. Dubbin complains that counsel spent 11 hours researching the cy pres implications of the Dubbin allocation appeal on the same date that he spent 9 hours working on the Katz appeal challenging other aspects of the settlement's fairness.

Given the importance of the two appeals to the ongoing implementation of the settlement (no distributions could be made until the appeals were resolved), the time was obviously important and well spent.

(f) In an effort to impeach counsel's credibility, Mr. Dubbin notes that the phrase HSF appears in Lead Settlement Counsel's contemporaneous records on Feb 28, 2001, even though formal notice of the organization's existence was not given to the Court until much later. The allegation is obviously designed to raise an inference that Lead Settlement Counsel's time records are not contemporaneous. This is not the first time that Mr. Dubbin has resorted to outright falsehood in an effort to attack the integrity of Lead Settlement Counsel. In fact, as Mr. Dubbin's letter to the Court dated November 20, 2003, states, counsel was informed of the formation of HSF on November 20, 2000 in a declaration filed with the Court by Leo Rechter. Moreover, Mr. Dubbin's letter to the Court dated December 2, 2003 notes that HSF had filed appeals from the District Court's allocation orders in December, 2000. To the contrary, the first organizational meeting of HSF took place in Miami, Florida in February, 2001. Its existence was first made known to the Court on November 16, 2000, in a letter utilizing HSF letterhead signed by Joe Sachs and Leo Rechter. Mr. Dubbin was unquestionably aware of these facts since they are drawn from his motion papers arguing the HSF had standing to appeal from the Court's allocation orders.

(g) Mr. Dubbin complains that counsel spent 3.5 hrs on August 23, 2002 discussing Mr. Dubbin's objections to the allocation of interest, and 6.5 hrs reviewing the objections with other counsel and analyzing them. Once again, since the objections threatened the flow of funds to poor survivors, Lead Settlement Counsel, who was on vacation, made every effort to deal immediately with the objection, head it off and, if necessary, take the necessary legal precautions to assure the unbroken flow of funds. Reviewing the calculation of the interest, and the legal authority to make the cy pres allocation consumed the bulk of the time, which was necessary and well spent;

(h) communication with the class – Mr. Dubbin objects to compensation for time spent in appearing at fora in order to explain how the settlement worked, to provide information concerning the filing of claims, and to answer unfair criticism of its terms by Holocaust deniers. Such activity is clearly the responsibility of Lead Settlement Counsel. It is fully distinguishable from personal speeches given by Mr. Dubbin criticizing the settlement, for which he demanded unjustified compensation;

(i) Mr. Dubbin objects to compensating Lead Settlement Counsel for evaluating fee requests, including Mr. Dubbin's preposterous claims for fees, arguing that counsel represented that he was doing so *pro bono*. Once again,. Mr. Dubbin willfully misunderstands the difference between pre-settlement *pro bono* work, which was relevant to the calculation of other counsel's pre-settlement fees, and post-settlement work, which was wholly unrelated to the fees. The language quoted by Mr. Dubbin involves the need for a risk multiplier for pre-settlement work, which was obviated by the existence of pre-settlement *pro bono* counsel;

(j) Mr. Dubbin objects to compensating counsel for hours spent negotiating disclosure and claims processing, arguing that it provided little or no benefit to the class. Such an astonishing mis-statement is belied by the fact that the claims programs painstakingly negotiated by Lead Settlement Counsel have resulted in the payment of almost $600 million to named members of the deposited assets, slave labor and refugee classes;

(k) Mr. Dubbin objects to fees for negotiating the insurance program. This is an astonishing turn-about from Mr. Dubbin's initial characterization of the insurance claims program as worth $100 million in his fee application. In fact, the program is modest, but was necessary in order to permit the rest of the settlement to go forward. Mr. Dubbin's insurance objections had imperiled the settlement and forced the Court to direct Lead Settlement Counsel to negotiate an insurance claims program to permit the $1.25 billion settlement to be approved. Lead Settlement Counsel did so. None of the information gathered by Mr. Dubbin was remotely relevant to such a claims program. If Mr. Dubbin wishes to pursue an action against the Swiss insurance industry based on the information he claims to have unearthed, he remains free to do so;

(l) Mr. Dubbin's final objection is an attempt to once again claim that different parts of the class should be set off against each other. Mr. Dubbin claims that counsel's requested fee exceeds the Looted Assets payments to American survivors. In fact, $205 million in Looted Assets payments have been allocated for payment over the life expectancies of the poorest survivors, wherever they reside, including approximately $10 million to survivors residing in the United States. Moreover, approximately 25% of the $800 million distributed to class members thus far has been paid to survivors residing in the United States.

(m) Lead Settlement Counsel notes that after two months of effort, Mr. Dubbin has objected specifically to about 70 hours of the more than 8,000 hours recorded in Lead Settlement Counsel's fee application. Since Lead Settlement Counsel has already discounted his fee by approximately 2,000 hours, Mr. Dubbin's quibble with 60 hours is, even for Mr. Dubbin, a foolish exercise.

9. In typical fashion, Mr. Dubbin has once again failed to comply with the schedule to which he had agreed requiring that all material supporting his objections be filed by February 17, 2006. Instead, Mr. Dubbin waited until the last day, February 17, and faxed an unprecedented, untimely and wholly unsupported demand for intrusive discovery involving time records filed with Kenneth Feinberg and Nicholas deB Katzenbach in 2000 in the German slave labor cases. Mr. Dubbin, who is certainly no stranger to this litigation, makes no attempt to explain why he waited for six weeks to seek discovery of billing records in another case, why he elected to fax a letter containing his wholly unsupported discovery request on the date his supporting material was due, and what could possibly justify his demand to engage in intrusive discovery in the teeth of a detailed, sworn fee petition containing elaborate contemporaneous time records that are keyed to the performance of tasks under the direct supervision of the Court.

10. Indeed, apart from wholly unsupported innuendo attacking the integrity of Lead Settlement Counsel's contemporaneous time records, Mr. Dubbin makes absolutely no showing as to why he should be granted leave to conduct a fishing expedition through billing records filed under seal in another case.

11. Mr. Dubbin's wholly unsubstantiated request for an intrusive fishing expedition involving records in other cases, and counsel's private life, should be contrasted with the careful words of the Advisory Committee describing discovery under Rule 23(h):

> A class member…may object to the fee motion…The court may allow an objector discovery relevant to the objections. In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. See Rule 26(b) (2). One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee information standard applicable to the case. *If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information.*

12. The contemporaneous time records submitted in support of this application describe work done at the request of, and under the supervision of, the District Court. Mr. Dubbin makes no effort to challenge the detailed description of those tasks contained in the petition, nor could he. Nor does Mr. Dubbin question the fact that the legal work was highly successful, permitting implementation of the settlement agreement and the distribution of more than $800 million, while increasing the settlement fund by more than $50 million.

13. Instead, Mr. Dubbin rests his discovery demand solely on baseless and wholly unsupported innuendo that counsel's sworn time records are inaccurate. However, where, as here, contemporaneous time records reflect work done with the knowledge of the District Court and under its ongoing supervision, and where no question exists concerning the extremely successful performance of the tasks at issue, an objector must do more than launch baseless and wholly unsupported innuendo about the accuracy of sworn time records to justify intrusive discovery.

14 Mr. Dubbin's behavior in this case has been genuinely appalling. As the Second Circuit found, he has engaged in "blackmail" and "extortionate activities" aimed at the class; has attempted to bilk the class of $5.2 million in unwarranted legal fees without providing any benefit to the class; has propounded baseless objections to the

distribution plan designed merely to support a fee application; and, as has lied about the date Lead Settlement Counsel learned of HSF's existence in a disgraceful effort to attack his integrity. His eleventh-hour demand for unjustified, intrusive discovery is nothing more than a continuation of his improper behavior. In the past, Mr. Dubbin's behavior was aimed at extracting money from the class. This time, he seems bent on extracting money from Lead Settlement Counsel as the price of allowing the fee application to move forward.

15. In the more than two months since Lead Settlement Counsel moved for an award of fees, as the material set forth below demonstrates, neither Mr. Swift, nor Mr. Dubbin have raised a colorable objection to the pending fee award:

A Objections to Notice

Both objectors argue that recently-amended Rule 23(h)(1) requires expensive, wasteful individualized notice to class members in connection with this fee application. The notice objection fails on multiple levels.

First, serious doubt exists concerning the applicability of Rule 23(h) to a fee award to Court-designated Lead Settlement Counsel for carrying out post-settlement administrative representation at the Court's request and under the Court's supervision.

Second, even if 23(h) applies, the notice originally given to the class in May, 1999, explicitly advised the class that counsel fees, including fees to settlement counsel, might reach $22.5 million. Since, in fact, fees have been limited to $7 million, the May, 1999, notice satisfies any notice requirement in connection with this fee application, which, if granted, will result in total counsel fees of approximately $11 million, or less than 50% of the figure approved by the class in response to the May, 1999, notice.

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In any event, Rule 23(h) requires "reasonable" notice. "Reasonable" notice of this application within the meaning of Rule 23(h) has been given to the class. Copies of the application and supporting documents were served on all settlement counsel, including Mr. Swift, as well as the Special Master for Allocation and Distribution. Copies of the application and supporting documents were also provided to Mr. Dubbin. Additional information was provided to objecting counsel at their request. Extensive newspaper accounts of the application have appeared in The Forward, Haaretz, and Israel News Service. On information and belief, an article is scheduled to appear in the New York Times as well. As a result of the widespread dissemination of the news stories, members of the plaintiff-class have communicated directly with the Court concerning the application. Finally, the application and supporting documents have been posted on the case website.

Accordingly, notice is simply not an issue. See *Cobell v. Norton*, 2005 U.S. Dist. LEXIS 34605 (December 19, 2005)(posting on website and publication in newspapers constitutes "reasonable" notice under Rule 23(h).

B. Estoppel, or Allegedly Misleading Activity Concerning an Intent to Seek Fees for Post-Settlement Work

Both objectors argue that, having waived fees for playing a substantial role in achieving this $1.25 billion settlement, Lead Settlement Counsel may not seek fees for post-settlement activity as court-designated Lead Settlement Counsel. Objectors apparently claim that co-counsel, the class, and reviewing courts were misled into believing that Lead Settlement Counsel would work for seven years without compensation merely because he declined to seek a fee for achieving the settlement. The charge is completely baseless.

Objectors fail to note that more than five months elapsed between the completion of Burt Neuborne's *pro bono* work in achieving the settlement, and his reluctant acceptance of Judge Korman's request that he serve as Lead Settlement Counsel, a request that was warmly endorsed by co-settlement counsel. In fact, at all times during the implementation of this settlement, both the Court and co-counsel understood that appropriate hourly lodestar compensation, comparable to that paid to a Special Master, would be payable in connection with post-settlement work by Lead Settlement Counsel. Declarations of co-settlement counsel Melvyn Weiss, Michael Hausfeld, Morris Ratner (joined by Martin Mendelsohn), Irwin Levin, and Richard Shevitz have been filed attesting to the understanding that Lead Settlement Counsel would receive appropriate compensation.

In each of the documents referred to by Mr. Dubbin in which counsel describes his *pro bono* work, Lead Settlement Counsel was careful to confine his description of his *pro bono* work to his efforts to achieve the settlement, or to his pre-settlement efforts. Moreover, counsel's widely distributed writings on the settlement contain an explicit statement of intention to seek hourly compensation for post-settlement work as Court-designated Lead Settlement Counsel. Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Related Litigation in American Courts,* 80 Wash. U. L. Q. 795, 804 n. 21 (2003).

Finally, objectors simply ignore the proceedings in open court on January 5, 2001, during which the Court explicitly distinguished between pre- and post-settlement legal work, and discussed the compensation of Lead Settlement Counsel at standard lodestar rates for his post-settlement work. The relevant portions of the transcript of the January 5, 2001 discussion on fees provide:

"**Judge Korman**: "I think we also have to probably divide this up into two parts, what I regard as the presettlement and the postsettlement part of the case.

In the post-settlement, we are not so much talking about achieving the result in terms of a settlement of $1.25 billion, but all the legal work that's gone into addressing all of the issues that's come up in the post-settlement process

* * *

At some point we are no longer dealing with achieving the settlement but of dealing with the tremendous problems that have risen in trying to bring the settlement proceeds ultimately to the beneficiaries of the class. *That's included in the tremendous effort and work by Professor Neuborne and Morris Ratner and Debra Sturman.* Those are three who come to mind immediately as having been involved substantially in that part, so what I think—my basic view is that the critical first step in this process has got to be simply deciding with respect to the settlement, who contributed what and who is responsible for what. Tr. January 5, 2001, p.12. Reprinted as JA-5992 in O4-1898(L)(emphasis added).

* * *

I think in a case like this, there really are two distinctly separate issues. In terms of the division of the case into part one and two, it is true that part two does not involve a risk in the sense that we already know what the package is. But it also makes it much easier to determine what the worth of the services in terms off what the outcome was.

What, for example, just to take the appeal from the denial of the motion of the Polish group to intervene, that's a discrete issue that came up. It involved handling an appeal. It involved preparing a brief. It involved arguing an appeal. One can make a judgment on that quite easily.[3] Tr. January 5, 2001, p 30. JA 6001.

* * *

As I said, I think it is easier – the second half of what I call the two-part case...because it's regular legal work. You know, you did x number of hours on – there's no problem, and I don't necessarily need to get involved in making a judgment about how much is contributed to the end product.

I mean there were hundreds, if not thousands, of hours of legal work that went into the second phase of this litigation. As it happened, it contributed a lot. But it would be called – this is traditional legal work in which evaluating it is not terribly difficult." Tr. January 5, 2001, p.59. JA 6017.

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[3] Lead Settlement Counsel had briefed and successfully argued the appeal being discussed by the Court. See *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2d Cir. 2000).

Since the Court is fully cognizant of the circumstances surrounding Lead Settlement Counsel's reluctant decision to undertake the substantial responsibilities of Lead Settlement Counsel, since counsel has been meticulous in describing the limited scope of his *pro bono* activity and his intention to seek post-settlement hourly fees, and since the issue has been extensively discussed in open court, absolutely no basis exists to punish counsel for having waived fees in connection with obtaining the settlement by denying him fees for seven years of dedicated and successful post-settlement service as Lead Settlement Counsel. See *In re Worldcom, Inc. ERISA Litig.*, 2004 U.S. Dist. LEXIS 20671 (S.D. N.Y. 2004)(Cote, J.)(awarding $5 million, or 20% of settlement fund, to Lead Settlement Counsel for post-appointment work).

C Entitlement to Hourly Lodestar

Both objectors challenge Lead Settlement Counsel's entitlement to an hourly lodestar of $700. First, Mr. Swift argues that academics are not entitled to market lodestar rates because of their lower cost structure. In fact, counsel is reimbursing NYU for the cost of secretarial and other mechanical services needed to administer the litigation. More importantly, the Supreme Court has explicitly rejected Mr. Swift's position in *Blum v. Stenson*, 465 U.S. 557, 562 (1984), where the Court held that lodestar fees may not be decreased to reflect the lower cost structure of public interest lawyers.

Second, Mr. Swift suggests that Burt Neuborne would not command a $700 hourly lodestar fee in the relevant legal market. However, declarations submitted by FAO Schwarz, Jr., (Cravath), James Johnson (Debevoise), and Joshua Rosenkranz (Heller Ehrman) clearly establish that $700 per hour is an appropriate lodestar in the relevant New York market for a litigator of Neuborne's experience and reputation, and clearly establish that Burt Neuborne would command at least $700 per hour in the New York legal market. Moreover, Mr. Swift has been informed that Mr. Neuborne is currently engaged in a complex litigation for a private client whose identity is privileged, and is billing at the rate of $700 per hour.

Since objectors do not contest the fact that current lodestar rates are payable in order to reflect the deferred nature of the compensation. *Le Blanc-Sternberg v. Fletcher*. 148 F.3d 748, 764 (2nd Cir. 1998), no issue remains concerning the appropriate lodestar.

D. Objections to Accuracy of Time Records

Finally, objectors question the accuracy of Mr. Neuborne's contemporaneously maintained time records.

In response to their concerns, Mr. Neuborne informed Mr. Swift, at his request, that Mr. Neuborne's contemporaneously maintained records submitted to Kenneth Feinberg and Nicholas deB Katzenbach in 2000 in connection with the German slave labor cases indicate that a total of 627 hours were billed by Mr. Neuborne in 2000 in connection with the German slave labor litigation, in addition to the approximately 1,800 hours billed in connection with the Swiss bank settlement. Given the intensity of the working environment in 2000, a total of 2,500 hours billed to all Holocaust-related matters is wholly unremarkable. Lead Settlement Counsel has already assured both the Court and the objectors under oath that a review of the records indicates no overlap or double billing.

In addition, Lead Settlement Counsel submitted a supplemental declaration dated February 3, 2006, explaining two anomalies described by Mr. Swift in the time records. Lead Settlement Counsel explained that blocs of time begun in one day and carried forward continuously to the next day were routinely billed to the first day, resulting in an occasional billing anomaly of excessive hours in the first day in those numerous settings where counsel worked far into the night. Lead Settlement Counsel also explained that extensive conferencing was necessitated by the complexity of the issues raised during the renegotiation of much of the settlement agreement during 2000, and by the large number of conflicting views on each issue requiring constant round-robin discussions in an effort to reach agreement. Finally, Lead Settlement Counsel noted that each contemporary time record was cross referenced against a computer indication of the document or communication involved.

Finally, Lead Settlement Counsel has refuted each item referred to by Mr. Dubbin in his February 17 supplemental objection. See *supra,* para.9 .

Objectors do not question the description of the enormous volume of work performed by Lead Settlement Counsel over the past seven years. Nor do objectors question the extraordinarily successful nature of the representation, or the fact that it added more than $50 million to the settlement fund. While objectors quibble that Mr. Neuborne should have delegated unspecified aspects of the work to others, as the declaration of Morris Ratner demonstrates, work was, in fact, delegated whenever possible. The complex and unorthodox nature of this settlement made further delegation inappropriate. There was a reason why the Court pressed Mr. Neuborne to serve as Lead Settlement Counsel. Undue delegation to less experienced counsel would have defeated that purpose.

Since the vast bulk of Mr. Neuborne's work was carried out in public, often at the direction of the Court and always under with the Court's knowledge and approval, and since Lead Settlement Counsel has provided the Court with an elaborate contemporaneously maintained record of his time, no basis exists to question the accuracy of the records, the necessity of the work, or the integrity of Lead Settlement Counsel. As the Supreme Court noted in *Hensley v. Eckerhart*, 461 U.S. 424, 437 and n. 12 (1983), once a sworn petition describing contemporary time records has been submitted, the burden shifts to objectors to present credible evidence raising genuine doubts as to the accuracy of the records, especially when the objectors were participants in many of the proceedings described in the records. Mere expressions of skepticism will not suffice. See *Blum v. Stenson*, *supra* at 891-92, and n. 5.

In fact, the objectors' position literally parallels the Supreme Court's rejection of the inadequate objection to the fee application in *Blum v. Stenson*:

> [Objector] submitted no evidence to support her claim that the hours charged by [counsel] were unreasonable. Instead [objector] rested her claim that the hours were duplicative and excessive and the rates exorbitant on arguments contained in her brief to the District Court and on that court's discretion. *Blum, supra,* 465 U.S. at 891.
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> * * *
>
> As noted above, [objector] failed to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged [citing *Hensley v. Eckerhardt*, at 461U.S. 437 and n. 12], of the facts asserted in the affidavits submitted by [counsel] *Blum, supra,* 465 U.S. at 892, n 5.

Accordingly, since none of the objections to Lead Settlement Counsel's fee award have merit, the Court should grant the application forthwith or, at a minimum, schedule an immediate hearing on the fee application.

Dated: February 24 , 2006
New York, New York

Burt Neuborne
40 Washington Square South
New York, New York 10012
(212) 998-6172

Exhibit A

From: Samuel Issacharoff
To: Dubbin, Sam
Date: 2/22/2006 3:10:22 PM
Subject: Re: Feb. 17 letter

Mr. Dubbin:

I continue to be at a loss as to your manner of practicing law. You apologise for my misunderstanding that a letter containing a cc to the Court was not in fact filed with the Court. But then you proceed to submit that same letter to the Court the same day as not one but two separate exhibits to your filing of Feb. 17, 2006. What's more, your exhibit one contains a copy of your February 17, 2006 letter with the date removed and backdated to February 1, 2006. I am simply at a loss for what you are doing.

Let me be clear as to our correspondence and telephone communication. I informed you on the telephone that Mr. Neuborne does not have any time records of any litigation during the period in question for any cases other than the present matter and the German Foundation litigation. There are no other records kept that pertain to billing for litigation. I cannot produce that which does not exist, even if I were so inclined. I will not produce his personal records of gatherings with family, friends, doctors, dentists, etc. I understand from your e-mail below that you agree that these are improper areas of discovery. Nor will I produce records of how he spent his time when not working on this matter. I do not know of any authority for discovery on this score and you have provided none.

You now urge that the German Foundation arbitration records may be necessary to see if the arbitrators somehow already compensated Mr. Neuborne for his work in this case. I continue to object to the discovery of materials outside the scope of this litigation, particularly so when it is subject to a confidentiality agreement. You do however raise the possibility that the arbitrators in the German Foundation matter may have thought they were compensating Mr. Neuborne for the Swiss litigation. Without waiving the privilege against production or my objection to the relevancy of this request, I will reproduce for you the entirety of the discussion of compensation for the Swiss bank matter in the German Foundation litigation. In the application itself, filed November 8, 2000, footnote three states:

"I declined to seek fees in connection with achieving a settlement in the Swiss Bank cases for personal reasons. I plan to seek modest hourly compensation for my post-settlement activities as court-appointed lead settlement counsel."

In the schedule of time charges to the same document, footnote one states:

"The time charges reflected in this document are for activities in connection with the litigation and negotiations that culminated in the establishment of the Foundation. I have not included any time attributable to the Swiss bank litigation. When significant travel is involved, I have attempted to subtract pure travel time so as to bill only for time actually expended in the performance of legal tasks. Finally, I have made no effort to bill for the enormous expenditure of time in connnection with efforts to respond to individual inquries from Holocaust victims about the pending litigation, or their right to receive funds from the Foundation or the Swiss settlement fund. As a matter of general practice, I set aside several hous a week to speak to individual Holocuast victims."

Those footnotes are produced in their entirety. I trust that this satisfies your concern about the arbitrators mistakenly assuming they were compensating Mr. Neuborne for the Swiss banks litigation.

Finally, I notice that your First Supplement Objections, which I received only today, carry a request that Mr. Neuborne's fee application be posted on the Court's website. I am not sure if you had the opportunity to check the website prior to filing, but the application is indeed on the website.

Sam Issacharoff

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>>> "Sam Dubbin" <sdubbin@dubbinkravetz.com> 2/22/2006 12:14 PM >>>

Mr. Issacharoff,

With respect to my letter of Feb. 17, I apologize for any misunderstanding. The letter does indeed show a copy to the Court but I did not in fact fax that letter to Judge Korman. The "cc" reference was my mistake. I did attach the letter as an exhibit to the Survivors' Supplemental Objections which I filed and served, to explain my clients' position concerning the need for other information.

As for the merits, for the reasons expressed in the US Survivors' Feb. 17 Supplemental Objections, I believe it is appropriate to obtain the information requested in the letter. Mr. Neuborne's declarations to the German Foundation arbitrators may have been confidential for that proceeding but if he referred to his pro bono status in the Swiss case in his declaration supporting his request for compensation from the German arbitrators, that would be relevant to his current fee request.

With respect to other time requested, the advisory committee notes say that discovery is within the court's discretion, and the circumstances here warrant such discovery. For example, in June 2001, in a news report about the German Foundation fees, Mr. Neuborne was reported in the New York Times as saying "There wasn't a day in the last four years that I haven't worked hard on this case." Those four years would have overlapped significantly with the periods for which fees are sought here. That, as well as the discrepancies in Mr. Neuborne's Swiss time records such as those noted in my clients' Supplemental Objections, make my request reasonable under the circumstances.

The request does not seek personal information, only time charged to the German case and other professional engagements for time periods overlapping with this request.

Sam Dubbin

CC: rswift@kohnswift.com

From: Samuel Issacharoff
To: rswift@kohnswift.com; sdubbin@dubbinkravetz.com
Date: 2/20/2006 3:51:43 PM
Subject: Further information

Please accept this e-mail as a response to Sam Dubbin's fax of Feb. 17, 2006. I was out of town on Friday and just received this.

I find myself at somewhat a loss as to how to respond. Your letter begins be stating that you understand my position to be that we need supply only Mr. Neuborne's total hours for 2000. As the prior e-mail shows, however, this is not my understanding of what I need to do, this is what we agreed to on our phone conference nearly two weeks ago. At that time, we agreed that I would provide the total hours for 2000 in the German case and any documents responsive to your other requests. The e-mail below provides that, as supplemented when we did indeed discover a court transcript that pertained to your request. Further, you requested time until Feb. 17, 2006 to supplement the record, which I again agreed to.

Now, on Feb. 17 you want to open the same discovery issues that we resolved on the phone call. And you do so by fax with a copy to the Court. This is a most curious way to practice. I am relatively new to this case, but sudden changes of heart after agreement by counsel with letters to the court before you have even attempted to resolve this with me is a form of federal practice that I am unfamiliar with. You invoke with great solemnity the advisory committee notes to the 2003 amendments to FRCP 23(h). Is this form of practice anticipated in the 2003 amendments to Rule 23?

The simple answer to your request is that we provided you with what seemed reasonable in a conversation of all counsel. You now request Mr. Neuborne's declaration filed with the German Foundation Fee Arbitrators, which you have been told was served in camera by agreement of all counsel, including Mr. Swift. Please provide me case authority establishing your entitlement to take discovery of counsel hours and submissions in other litigation not subject to a fee request, under amended Rule 23(h) or elsewhere, and we will consider this request.

Second, you request Mr. Neuborne's "daily time recordss for 1999 and 2000 (and 2001 if any); i.e., time periods overlapping with this fee request." I do not understand this request at all. You have Mr. Neuborne's contemporaneous time records for this case, produced as an exhibit to hie initial fee submission. If you are requesting his time actual records in the German Foundation case, I again object that this is irrelevant, outside of what we agreed to, and now untimely. But if you provide me case law establishing your entitlement to take discovery of counsel hours in other litigation that is not subject to a fee request, under amended Rule 23h) or elsewhere, we will consider this request. Finally, if your request is even broader, seeking to know the time and dates of Mr. Neuborne's visits to his doctor and his dentist, you are way out of bounds. Again, show me the case law supporting your right to invade my client's private life and I will consider the request.

I am uncertain whether I need to copy the Court now to show that your request is both unreasonable and unprofessional in that we had already reached agreement. I would appreciate as we go forward that you show the professional courtesy to contact me before dashing off missives to the Court. That, by the way, is also anticipated by the rules governing discovery issues.

Sam Issacharoff

PS: Here is the text of the e-mail confirming our agreement on what would be provided. The e-mail dates from Feb. 10.

****

Please accept this e-mail as a response to factual questions raised during our conference call and in Sam Dubbin's letter of February 9, 2006.

1) The total number of hours worked by Burt Neuborne on the German cases in 2000 is 627.

2) There are no documents, transcripts or writings on conversations referenced in the Dubbin letter of 2/9/06. We do not have any record of when such conversation(s) occurred, only that these comments arose during the innumerable interactions between Mr. Neuborne and the Court.

I believe this satisfies all the requests for information outstanding.

Samuel Issacharoff
Reiss Professor of Constitutional Law
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40 Washington Square South
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(212) 998-6580
Fax: 212-995-4590
e-mail: si13@nyu.edu

From: Samuel Issacharoff
To: rswift@kohnswift.com; sdubbin@dubbinkravetz.com
Date: 2/16/2006 3:48:20 PM
Subject: Court transcipt

Please accept this e-mail to supplement our response to Sam Dubbin's request for any court records concerning compensation for Settlement Counsel. Attached please find a court transcript directed to that issue.

Sam Issacharoff

Samuel Issacharoff
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Fax: 212-995-4590
e-mail: si13@nyu.edu

From: Samuel Issacharoff
To: rswift@kohnswift.com; sdubbin@dubbinkravetz.com
Date: 2/10/2006 1:58:52 PM
Subject: Further information

Please accept this e-mail as a response to factual questions raised during our conference call and in Sam Dubbin's letter of February 9, 2006.

1) The total number of hours worked by Burt Neuborne on the German cases in 2000 is 627.

2) There are no documents, transcripts or writings on conversations referenced in the Dubbin letter of 2/9/06. We do not have any record of when such conversation(s) occurred, only that these comments arose during the innumerable interactions between Mr. Neuborne and the Court.

I believe this satisfies all the requests for information outstanding.

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Certificate of Service

I, Richard Kelsey, hereby certify that the persons listed below were served with the Final Supplemental Memorandum of Law and accompanying documents on this twenty-fourth day of February, 2006. Messrs. Dubbin and Swift were served via next-business day delivery service and the others on the list by first-class mail.

Richard Kelsey

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